

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

COMMIL USA \* Civil Docket No.  
\* 2:07-CV-341  
VS. \* Marshall, Texas  
\*  
\* May 17, 2010  
CISCO SYSTEMS, INC., ET AL \* 12:45 P.M.

TRANSCRIPT OF JURY TRIAL  
BEFORE THE HONORABLE CHAD EVERINGHAM  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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(Proceedings recorded by mechanical stenography,  
transcript produced on CAT system.)

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\* \* \* \* \*

P R O C E E D I N G S

(Jury in.)

THE COURT: Please be seated.

Closing arguments at this time,

Mr. Sayles.

MR. SAYLES: May it please the Court.

Counsel.

Ladies and Gentlemen, I know you're ready  
for me to get down to business, and I intend to do that  
in just a minute, but I want to make a couple of  
comments to you that I just simply cannot resist.

First of all, our opposing counsel has  
done a good job. They're not the B team. Let me tell

1 you, Cisco did not send the B team out here to do damage  
2 control. They sent the A team. I commend the opposing  
3 counsel in that regard.

4           Second, I want to tell you how much I  
5 appreciate your service. And by doing that, I in no way  
6 ask for any favor, because what we're asking you for  
7 here is a jury verdict that represents justice. But I  
8 must thank you for your service, because it's only in  
9 the United States of America that we have people like  
10 you who are making decisions like we're having made here  
11 today.

12           There are two constitutional rights  
13 involved in this case. The first is patents and the  
14 patent laws derived from the Constitution of the United  
15 States. And here you are.

16           The Seventh Amendment to the United  
17 States Constitution permits a trial by jury in all civil  
18 cases. And here you are.

19           I know that sometimes when you hear all  
20 the high-powered, highly compensated witnesses in the  
21 case and you hear about the many millions of dollars  
22 involved, you may have a feeling, well, why am I  
23 involved in that?

24           Well, you're involved in it, because, in  
25 our country, we believe that justice is obtained by

1 having people just like you make our most important  
2 decisions. And I have stood before the bar of justice  
3 for 36 years, and I know that with the wisdom in this  
4 jury box -- and I've added up your ages, and there's  
5 over 340 years of life experience in that jury box --  
6 that you can and you will make a decision that  
7 represents justice.

8                   Now, let me go to this case and talk  
9 about it for just a moment.

10                   First of all, there are three questions,  
11 basically, that you are to decide, and while all the  
12 Court's instructions are important, there are three  
13 instructions that will be very helpful to you in  
14 deciding those issues.

15                   The first question you'll be asked is was  
16 there infringement of the '395 patent? Was there  
17 infringement? That's the factual question.

18                   From all the evidence that you've seen, I  
19 think you'll conclude that, yes, there was. But the  
20 important legal principle that you have to keep in mind  
21 is the one that Judge Everingham gave you at the start,  
22 and he'll give it to you again, and that is to prove  
23 infringement, the burden of proof on us is by a  
24 preponderance of the evidence. That means more likely  
25 than not.

1                   And I asked you in voir dire, if anybody  
2 thought that was unfair, because that is the law, and  
3 everyone agreed that they could and would follow the  
4 law.

5                   The second issue that you'll be asked to  
6 decide in this case are the questions regarding validity  
7 of the patent. That's defensive issues that the Cisco  
8 lawyers have the burden of proof on. And there's a very  
9 helpful instruction on the law that will help you there.

10                  First, a patent has a presumption of  
11 validity, a legal presumption of validity, and it  
12 applies to the factors that can be brought out to try to  
13 defeat that patent, including enablement, including  
14 written description.

15                  And the Patent Office deemed this patent  
16 sufficient to issue the claims that it issued, and it  
17 enjoys a legal presumption of validity.

18                  Now, the next legal principle that you  
19 have to apply here is the burden of proof to overcome  
20 that presumption. And it's a higher burden of proof,  
21 and the Judge said this in the beginning: It's clear  
22 and convincing evidence.

23                  And I'm going to show you the words for  
24 clear and convincing evidence in a few minutes, because  
25 it's so important. But clear and convincing evidence

1 means that you have to be convinced that what is claimed  
2 is highly probable, meaning you might -- you can even  
3 think that, well, maybe it was. That's not enough.  
4 Highly probable.

5                   Because if you're going to tear up and  
6 throw away a patent issued by the United States  
7 government, you have to meet that high burden. That's  
8 applying the law to the facts.

9                   Now, I want to show you the verdict form  
10 very quickly. You'll receive a verdict form, and you'll  
11 take it back into the jury room, and let's look at the  
12 first issue.

13                   I'm going to ask and suggest to you that  
14 there is one way to answer the questions, please, on the  
15 first question which has to do with direct infringement.

16                   Based on the evidence, the answer to the  
17 three questions, and you're being asked about three  
18 claims: 1, 4, and 6. That's all you're being asked  
19 about.

20                   The answer is yes, and on this question,  
21 the burden of proof is that preponderance of the  
22 evidence that I told you about.

23                   Let's look at Question 2. Question 2 is  
24 the question about inducing infringement, and you'll  
25 receive instructions on inducement. And with those

1 instructions and the evidence that you heard, the answer  
2 to Question No. 2 is yes for each of the three claims.

3           The next question in the charge is the  
4 one upon which Cisco bears the burden of proof. And you  
5 have to watch the phrasing here, and it says: Did you  
6 find that Cisco has proven, you see at the top. It is  
7 their burden. And this is where that burden of clear  
8 and convincing evidence applies.

9           And so the answer on whether this patent  
10 is not enabled -- enabled is no, and whether it lacks a  
11 sufficient written description is no.

12           If you correctly apply the burden of  
13 proof, there is no way that you can answer this  
14 otherwise. The -- the Defendant's own expert went both  
15 ways on that issue. Yes, it's valid. No, it isn't  
16 valid.

17           And then the next question that you'll be  
18 asked to address is a question of a reasonable royalty,  
19 and based on the evidence -- and I'm going to discuss it  
20 in more detail in a moment -- the damages that you  
21 should return are a reasonable royalty of \$56,184,916.

22           All right, that's what the evidence  
23 supports.

24           Now, I'm going to go through some factors  
25 that I think will help you determine infringement.

1           First of all, you know from the Judge's  
2 instructions that to determine infringement, you compare  
3 the claims of the patent to the accused products. You  
4 don't compare Commil Limited in Israel's business, their  
5 attempts to make a Wi-Fi product. That has nothing to  
6 do with infringement.

7           You look at the patent and its claims in  
8 the accused products. And, in fact, here is the Court's  
9 instruction: To determine whether there is an  
10 infringement, you must compare the allegedly infringing  
11 product with the scope of the claims as I have defined  
12 them for you. That will be in Judge Everingham's  
13 instruction. That's the law.

14           You know the significant dates, and I'm  
15 just going to touch on these briefly. The inventors  
16 drafted their patent application in March of 2000, and  
17 they filed their patent application in April of 2000,  
18 and the patent was issued in August of 2002.

19           Now, that's important for -- for --  
20 mainly for one reason. You heard evidence about the  
21 fact that Cisco has a stack of patents that are up  
22 there. None of them predate the Commil patent  
23 application. It wasn't even claimed. They couldn't  
24 attempt to claim it, because it wouldn't have been true.

25           And the idea behind this patent is to



1 split the media access control architecture, and it is a  
2 method patent. And the way you place it makes mobility  
3 more seamless, more useful. That's what the patent was.

4           Then there have been numerous efforts to  
5 limit this patent in some way to Bluetooth, and I think  
6 you've heard over and over from the lawyers and from the  
7 Court that this patent is not limited by the preferred  
8 embodiment. And, in fact, the technical field of  
9 invention, described in the words of the patent, is  
10 wireless communication systems.

11           The scope of the invention described in  
12 the patent itself describes telephone handsets, cordless  
13 telephones, cellular telephones, personal data devices,  
14 personal digital assistants, computers, laptops, e-mail  
15 servers, and other things. Clearly, the words of the  
16 patent, in describing the scope of the invention, are  
17 much broader than Cisco would have you believe, and it's  
18 right there in the patent.

19           Following the issuance of this patent,  
20 what happened?

21           Well, Airespace made their breakthrough  
22 with the split-MAC architecture already invented in the  
23 patent, and they did that in February of 2004.

24           How did that describe that?

25           They described that new architecture,

1 which is a method already embodied in the Commil patent,  
2 as changing the game for wireless local area networks,  
3 Airespace's breakthrough split-MAC architecture. That's  
4 their description of what they had.

5           And then Cisco -- of course, you heard  
6 all about this and I'll only mention it briefly. Cisco  
7 bought Airespace for \$450 million, and that time happens  
8 to be the time of the hypothetical negotiation that we  
9 get to to determine damages.

10           Now, was this split-MAC architecture and  
11 what's embodied in the patent valuable at that time?

12           Let's look at Cisco's own press release  
13 when they said how they felt about their acquisition of  
14 Airespace. This is at the time these two parties,  
15 Commil and Cisco, would have sat down at the bargaining  
16 table. They say, once they reached a definitive  
17 agreement on purchasing the award-winning product  
18 portfolio, it would expand Cisco's structured wireless  
19 area network solution, accelerating the delivery of key  
20 WLAN capabilities and features for Cisco's entire  
21 customer base.

22           Now, folks, this is not just some trivial  
23 little thing that they've acquired here. They're saying  
24 in a press release that it will enhance their  
25 capabilities for their entire customer base. This is

1 Cisco's words, and they say that with this, they are  
2 uniquely positioned to take advantage of a rapidly  
3 growing enterprise.

4           So don't you know, when they sit down at  
5 the bargaining table when we talk about this reasonable  
6 royalty in a few minutes, that they would have had this  
7 in mind. They're saying it to the public in press  
8 releases that this is a growing enterprise. It was  
9 highly important to them.

10           And, of course, you know that from the  
11 time of the acquisition of Airespace to the last quarter  
12 for which we had data in this case, the sales of the  
13 accused products exceeded \$1.1 billion.

14           THE COURT: You've used 15 minutes.

15           MR. SAYLES: All right.

16           Whether the Cisco products use the  
17 split-MAC architecture, you don't have to take our word  
18 for it. You can look at their own documents, and I'm  
19 just going to go through a few.

20           Here is a document from Cisco that shows  
21 indeed that the access points are being accessed by  
22 various wireless devices and going to a controller.

23           Their own documents say that they -- you  
24 know, there's also this argument today as a matter of  
25 fact and throughout this trial about whether they really

1 split the MAC function on a real-time basis or not.  
2 Cisco's document says they do. It says the real-time  
3 function and the non-real-time functions are split, just  
4 like we say they are in this lawsuit.

5           Should you believe what they say now that  
6 they'd like to rewrite the documents, or should you  
7 believe what their documents said when their guard was  
8 down and the truth came out?

9           This is simply another document -- I  
10 can't go through them all -- where Cisco itself talks  
11 about the time split and the real-time functionality and  
12 the non-real-time functionality being split, just as we  
13 say it is, and that's one of the elements of the claim.  
14 Here's a drawing where the wireless LAN controller shows  
15 non-real-time, and the lightweight access point shows  
16 real-time, a Cisco document.

17           As I mentioned, the preponderance of the  
18 evidence is what is more likely true than not true, just  
19 barely tip the scales. That's what it takes for  
20 infringement.

21           The Claim 1, we've been through all the  
22 elements. They're all there. You heard from Joe  
23 McAlexander, and you saw the documents of Cisco. There  
24 was infringement here, certainly by a preponderance of  
25 the evidence.

1           The term switch, we heard throughout this  
2 case that somehow this case is just about phone calls.  
3 This case is limited to telephone calls. Heard that in  
4 opening statement. The term switch means an apparatus  
5 for routing telephone calls. That is the definition in  
6 your book.

7           But listen carefully when Judge  
8 Everingham gives his instructions. He will instruct you  
9 that the invention is not limited to making telephone  
10 calls. That's the law. And you're going to hear that.  
11 Claim 4 simply adds switch handling routing of data. It  
12 does; it's infringed.

13           Claim 6 has the mobile units being  
14 selected from a group, whether it's a handset or a  
15 personal digital assistant and the like, a laptop, a  
16 computer, easily met. So that's infringed.

17           There was a claim by Bob O'Hara that when  
18 he testified in Court that mobility was solved by  
19 802.11. That wasn't any big deal, but when his  
20 deposition was taken, he said that improvement of  
21 mobility was a necessity.

22           So what's invented in this patent is  
23 important. He said one thing in deposition, said  
24 another thing in the courtroom.

25           Intent is not required for direct

1 infringement. You'll hear this instruction from Judge  
2 Everingham in a few minutes. Cisco did not have to know  
3 what it was doing was infringing to be guilty of direct  
4 infringement.

5           And when they bought Airespace and  
6 started putting out products, they didn't have to know  
7 to infringe the patent or that they were infringing.  
8 They could even believe in good faith that they weren't.  
9 That's the law. Judge Everingham will give it to you.  
10 The fact that there are other patents. You've been  
11 instructed a couple of times, and I know that's hard to  
12 understand. Well, gosh, if Airespace and Cisco have a  
13 number of patents, what's this all about?

14           It's no defense in a patent infringement  
15 case that other patents may cover some aspect of the  
16 invention. That's the law.

17           THE COURT: You've used 19 minutes.

18           MR. SAYLES: The patent is presumed  
19 valid. I've mentioned that to you. That will come from  
20 Judge Everingham in a few minutes.

21           Clear and convincing evidence is highly  
22 probable, the facts are, as a party contends.

23           I want to talk to you about Dr. Becker,  
24 the damages expert. The damages experts really don't  
25 disagree that much, and I'm going to tell you why. Dr.

1 Becker mentioned a license for 5.75 percent, the  
2 Qualcomm license.

3 But you know what he did to get his  
4 percentage down to .6?

5 He -- he said that the Qualcomm license  
6 had a batch of patents in it, and he divided by the  
7 number of patents in it in order to get that number down  
8 to .6. But he admitted on cross-examination that if  
9 someone violates even one patent in that portfolio, just  
10 one, they pay 5.75 percent.

11 Now, we heard which one doesn't belong.  
12 The .6 doesn't belong. 5.75 percent in Qualcomm was  
13 used by both experts, but Mr. Becker just tried to  
14 explain it away.

15 So if you take the 5-percent royalty,  
16 which is reasonable, and you heard the analysis of  
17 Mr. Carlile. And then consider Mr. Becker the way he  
18 tried to get rid of the 5.75-percent Qualcomm license, I  
19 think you'll conclude that the reasonable royalty is  
20 \$56,184,916.

21 We'll reserve the balance, Your Honor.

22 THE COURT: 19 minutes remaining.

23 MR. CARROLL: If the Court please, Your  
24 Honor.

25 THE COURT: Mr. Carroll.

1                   MR. CARROLL: Ladies and Gentlemen of the  
2 Jury, you are, in this case, truth-seekers. You are  
3 charged with the most important job in this courtroom,  
4 and that's determining the truth.

5                   And when you figure out what the truth  
6 is, all of those burdens, preponderance of the evidence,  
7 clear and convincing evidence, they'll all take care of  
8 themselves when you find out what the truth is.

9                   When you find out what the truth is,  
10 you'll know exactly what to make of some very  
11 complicated evidence. You'll know how to deal with it.  
12 And when you figure out what the truth is, you'll know  
13 how to answer that verdict form.

14                  You remember the most important trial in  
15 history, which we all read about as kids, in the Bible  
16 had that very question from the judge. What is truth?  
17 What is truth?

18                  It will be your time to answer that based  
19 on the evidence that you heard. And you know what the  
20 truth is in this case. You saw it on the second day  
21 when Mr. David testified, the very smart lawyer, the  
22 very successful lawyer, who bought these patents from  
23 essentially a foreclosure, when a bank shut the doors on  
24 this company over in Israel. You remember Mr. David got  
25 the inside word from his cousin, who works with the bank



1 that forecloses on people over there and kicks them out  
2 of their businesses. And then he bought that patent  
3 for -- from -- through that process. That's the truth.  
4 He told you that he hadn't even bothered to read the  
5 patent. That's the truth.

6                   He told you that he never ever paid any  
7 attention to whether Commil, the inventors, could or  
8 couldn't, did or didn't apply their patent to Wi-Fi.  
9 That's the product that they're suing us for. And  
10 that's the truth.

11                   And maybe most importantly on that day --  
12 I think it was Wednesday last -- you learned something  
13 else that to me is a powerful true fact. And that is  
14 that they brought -- folks right over here, they  
15 bought -- brought the inventor, whose name is on this  
16 patent. You know, they -- they have the patent up and  
17 had it up the whole trial like a little shrine.

18                   In fact, I could barely see some of you,  
19 because the thing was there like, you know, we were all  
20 supposed to, you know, do obeisance to the shrine, to  
21 the patent, to the famous Arazi patent. There it is.  
22 And what did you learn on Wednesday?

23                   And you don't have to be a scientist or  
24 you don't have to be an engineer or you don't have to be  
25 an economist to know the significance of this. They

1 brought Mr. Arazi, whose name is on the little shrine  
2 there, as the primary inventor of this patent that they  
3 want \$56 million of Cisco's money for. They brought him  
4 all the way around the world from Israel, and they  
5 brought him here and told us they were going to have him  
6 available for us to put on that stand so that we could  
7 question him in front of you, so that you-all could  
8 learn what the truth is by listening to what he said.

9 And what did we learn?

10 They sent him home. They sent him home.

11 What does your common sense tell you  
12 about that?

13 It tells you that they were afraid of  
14 what the inventor of the little shrine over here would  
15 say, when he was asked the most important question in  
16 the case. And that is: Mr. Arazi, does that patent  
17 teach -- does that patent teach a person like you how to  
18 apply it to Wi-Fi?

19 Because they knew what his answer would  
20 be. They knew what his answer would be. And the answer  
21 would be no.

22 MR. WERBNER: Your Honor, I'm going to  
23 object to counsel -- there's no evidence. There's a  
24 deposition. There's no evidence.

25 THE COURT: Overruled.

1                   MR. CARROLL: So -- and by the way,  
2 that's Exhibit 1. They squeal loudest when you poke at  
3 it, and they can't explain that away. They wish they  
4 had that back, but they don't. They sent him home,  
5 because they were afraid of what he would say.

6                   Now, Mr. Werbner, you just heard what he  
7 did. That hurts them bad, and it should. And he's  
8 going to stand up here in a little bit and he's going to  
9 say, well, you know what; they took his deposition, and  
10 that's just as good.

11                  Well, forgetting for a minute the fact  
12 that they told us that they were going to bring him  
13 live, and we could rely on this. Forgetting about that  
14 for a minute. That is where the truth comes out.

15                  When you can see it, when you can watch  
16 him, because you know what? It's -- they're going to --  
17 Mr. Werbner is going to make a big point of skewering  
18 poor, old Dr. Lansford.

19                  Do you remember, Dr. Lansford was the  
20 fellow we put up here who was very involved in some of  
21 those Wi-Fi standards. And sure enough -- sure enough,  
22 they had him going both ways. They had him saying it's  
23 valid and it's invalid. But what they never got him to  
24 back off on or back up on is the fact that he said  
25 consistently that this patent won't work; it doesn't

1 teach; you can't understand Wi-Fi from this patent.

2 But you know what? He took his shots.

3 He sat right up there and took his shots. Arazi didn't,  
4 because they didn't want him to.

5 Bob O'Hara. Bob O'Hara comes here from  
6 California. He is the inventor, the father or the  
7 uncle, or whatever we came down with, with Wi-Fi. Bob  
8 O'Hara not getting paid a dime. Every one of the  
9 witnesses that they brought to you are paid one way or  
10 the other. They're paid by the hour, or they're paid on  
11 the basis of what they get, if you give them money.  
12 Every one of them. Every one of them.

13 Bob O'Hara was not. He doesn't even work  
14 for Cisco anymore. And he sat right up there on that  
15 stand where you could watch him, and he answered every  
16 question and tried his hardest to tell you what the  
17 truth was, and he did.

18 And the truth is that what he invented,  
19 and is today Wi-Fi, has nothing to do with the little  
20 Arazi shrine. Nothing.

21 Now, what's the best proof of what I'm  
22 just telling you? What's the best proof of the fact  
23 that the Arazi patent doesn't reach Wi-Fi?

24 They couldn't make it reach Wi-Fi. They  
25 couldn't build a Wi-Fi product. Now, let me warn you

1 right now about where the battle lines are going to be  
2 drawn, because you saw it about two hours ago when Joe  
3 McAlexander sat up there on that stand and Mr. Frahn  
4 said: Well, don't you agree, Mr. McAlexander, that  
5 because the inventors of this patent never achieved a  
6 concept of Wi-Fi on this patent, that that makes it  
7 invalid?

8                   And he said: Oh, no, I don't agree with  
9 that, because you're talking about a product. That's  
10 where -- that's how fine they're slicing the onion.  
11 That's how fine they're slicing the onion.

12                   But when you look at the exhibits, and  
13 I'm going to give you some numbers of exhibits, which  
14 Judge Everingham will send back in that jury room with  
15 you. If you want them, you can call for them. And I  
16 promise you that the truth is that they will prove  
17 exactly what Mr. Soffer, the one -- you remember  
18 Mr. Soffer, the Israeli ex-Army officer who testified?  
19 You remember what he said?

20                   Tracy, will you put that up there,  
21 Mr. Soffer, please?

22                   Now, that's what he told you either  
23 Tuesday afternoon or Wednesday morning. Never got to a  
24 proof of concept.

25                   Now, why is that important?

1                   It's important because that testimony  
2 alone invalidates the patent. That testimony alone  
3 invalidates the patent. But let me tell you where  
4 they're going to quibble, and Mr. Werbner is going to  
5 talk a lot about the qualifier, he says, of the term  
6 product.

7                   But when you look at the evidence, when  
8 you look at their own words, not in Court, but back in  
9 2005 when they were struggling to survive, you will see  
10 that they weren't talking about what Mr. McAlexander now  
11 says they were. And that is, how to build something.  
12 They were talking about trying to stretch this idea in  
13 this Arazi patent to fit something that it never was  
14 intended to fit. It never was intended to fit.

15                  Let me remind you of a couple of things  
16 that will show you why that's true. You remember all  
17 those questions this morning that Mr. Frahn asked  
18 Mr. McAlexander about all of the references in all of  
19 the patent -- information in the patent, what they call  
20 the file wrapper, about all of these other standards.  
21 And there was never one mention of Wi-Fi.

22                  Now, they try to weasel out of that.  
23 They try to weasel out of that by saying, oh, well, we  
24 were just talking about one way of doing it. They  
25 weren't. They were talking about a bunch of different

1 ways, except the most important, Wi-Fi.

2 What do you make of that?

3 Let's go to -- let me show you what I  
4 mean.

5 Let's go to -- let's go to that -- that  
6 first slide, DTX1138.

7 Now, this is an e-mail to Mr. Arazi. See  
8 his name up there? And this is Defendant's  
9 Exhibit 1138. If you want to write the number down so  
10 you can take it -- ask for it and take it back into the  
11 jury room if you -- if you don't believe what I'm  
12 telling you.

13 But look what it says. Look what it  
14 says. It says, brand new CAPWAP handover protocol  
15 draft. Now, you remember CAPWAP, for the purpose of our  
16 product, is Wi-Fi.

17 What's the date?

18 2005, just before they finally gave it up  
19 and said calf rope, we can't exist anymore.

20 What do they say?

21 This baby is not ours.

22 How could it be any plainer than that?

23 The people who invented the patent that  
24 Mr. David bought, that he wants \$56 million from Cisco  
25 from, were products, in their words, weren't their baby.

1 And look what else they say: But we can try to extend  
2 it for our distributed mobility.

3 What does that mean?

4 That means maybe we can figure out a way  
5 to make it work for what we do, in fact, teach. But  
6 they never did.

7 Now, Dick Sayles told you that you can --  
8 the law says that a person can accidentally infringe a  
9 patent. And believe it or not, that's true. Just like  
10 you can accidentally trespass. I could come on to your  
11 place and you might not have it fenced, and I might not  
12 know it, but it would be a trespass.

13 But guess what you can't do accidentally?

14 You can't invent something accidentally.  
15 You can't invent something that goes to one technology,  
16 see it fail, spend millions of dollars trying to make it  
17 work for another technology, and then say, oh, we  
18 invented that, too. And that's what this case is about.

19 That's the truth.

20 You remember I asked Mr. David up there  
21 on the stand on Wednesday if he had one piece of paper,  
22 one piece of paper that he could show you where before  
23 he took over the patent, before he bought the little  
24 shrine here, that said we, the inventors, think Cisco is  
25 infringing. Do you remember that?



1                   And he said no. He said, well, it's in  
2 the patent. Of course, he hadn't read it. But you  
3 haven't seen one piece of paper from them that will --  
4 that was written back at the time the inventors owned  
5 the patent that say what is they say today. Not one.  
6 So what are you supposed to make of that? What are you  
7 supposed to make of that?

8                   Does that suggest that they have carried  
9 their burden of proof, when they can't show you one  
10 thing, one piece of paper to say, yeah, oh, by the way,  
11 it works for Wi-Fi, too; we intended it to work for  
12 Wi-Fi, too?

13                   It's just not there. It's just not  
14 there.

15                   And by the way, you know, this is like  
16 when you were a kid playing baseball. You know,  
17 Mr. Sayles told you about tipping the scale, but guess  
18 what? The tie doesn't go to the runner. If they don't  
19 answer questions for you, if they don't tie up loose  
20 ends for you, then they lose. They don't get to the pay  
21 window.

22                   And let me tell you what -- what -- what  
23 I'm talking about there.

24                   Tracy, if you would, flip over to -- flip  
25 over to Slide 10. Slide 10.

1                   Oh, I'm sorry. Okay.

2                   You-all remember that there was a lot of  
3 discussion as late as this morning about this real-time  
4 versus non-real-time distinction, and Mr. Frahn and  
5 Mr. McAlexander agreed on one thing, and that is that in  
6 our products, in the products Bob O'Hara invented, that  
7 this step called authentication happens in a place in  
8 our product where it's different from what their patent  
9 says it must for them to win.

10                  Got me there?

11                  Very important. I want you to bear with  
12 me to go through this one more time. One of the few  
13 things that Joe McAlexander agreed with us on, on the  
14 stand, was that this step, this authentication, happens  
15 in our product at a place where it can't, if they're to  
16 win.

17                  Got me thus far?

18                  So, logically, you'd expect him to say,  
19 okay, you're right. You know, I'm wrong; we lose.  
20 But he said that's not real-time. Remember what he  
21 said? He argued about that's not real-time. And he  
22 said the very same thing that Mr. Sayles just said.  
23 Well, all I know is that they say it in all their  
24 documents. But he also admitted -- and bear with me now  
25 just a little bit, because it's a little technical.

1 But he also admitted that Bob O'Hara, the nice guy with  
2 the crew cut who invented all this stuff, was right when  
3 he said this takes place in 9 milliseconds. Nine  
4 milliseconds.

5                   And the point of that is that everybody  
6 had already agreed, including Joe McAlexander, that that  
7 was fast enough, that that was fast enough to qualify as  
8 real-time. So instead of accepting that, accepting his  
9 own limits, he says, no, the documents say something  
10 different.

11                   Well, guess what he also told you? And  
12 you'll remember this. Remember, he made a big deal  
13 about all these tests that he says he did, that he  
14 tested all of our products.

15                   Mr. Werbner asked him: Did you test  
16 them?

17                   Oh, yeah.

18                   Did you look at all of the secret  
19 components?

20                   Oh, yeah.

21                   Did they all work exactly like the Arazi  
22 patent?

23                   Oh, yeah.

24                   What proof of that did you see? Other  
25 than his word, what proof?

1                   Let me tell you why that says that you  
2 shouldn't believe that, is the very thing I just told  
3 you about this little piece of authentication. When he  
4 admits that it's fast enough to be real-time and admits  
5 that because it's -- if it's real-time where it occurs,  
6 they lose. But then says, but I still don't agree it's  
7 real-time.

8                   What if he had said: And I tested it,  
9 and Bob O'Hara is wrong? Or what if he had said: And I  
10 tested it and it doesn't happen at 9 milliseconds; and I  
11 tested all the other steps, all these other steps, and  
12 they happened faster than this, so I know it's not  
13 real-time?

14                  He didn't do any of that. He didn't tell  
15 you one thing about that. And, again, a tie doesn't go  
16 to the runner. A tie doesn't go to the runner.

17                  If he really tested that product, our  
18 product, the way he says, there's only one of two  
19 conclusions that you can draw. It doesn't work the way  
20 they say, or he didn't test it. Because don't you know,  
21 if he had and it supported what they said and needed to  
22 prove to you, as the truth, to get \$56 million, you  
23 would have heard about it.

24                  But you didn't. But you didn't.

25                  So all you have for that point as well as

1 every other point on infringement is Joe McAlexander's  
2 paid word. Joe McAlexander's paid word.

3           So, to me, the truth is what you've known  
4 and what you've seen from the first, from the second day  
5 of the trial until today. And this -- and that is -- as  
6 plainly as it said in that document that I showed you  
7 just a second ago, and that is Wi-Fi is not, was not,  
8 and will never be the baby of that patent, that Arazi  
9 patent.

10           So in my opinion -- may I have -- is the  
11 ELMO on?

12           THE CLERK: Yes.

13           MR. CARROLL: Thank you.

14           In my opinion, that one point alone  
15 justifies those three nos. Have they proved to you the  
16 truth of what they're saying?

17           And you and I know what the answer is,  
18 and the answer is no. And if you put those three nos  
19 down, the one thing that won't happen is that Mr. David  
20 won't fly back home later this week with a sack full of  
21 Cisco's money that belongs to Cisco and its employees  
22 here in Texas and its shareholders.

23           One of the things that you're going to  
24 see when you look at Judge Everingham's verdict form is  
25 that there are two infringement questions. The first is

1 direct infringement, and that's the one I just showed  
2 you. And that is, did Cisco itself infringe?

3 Well, that depends upon whether the truth  
4 is that the patent, the Arazi patent, is or is not the  
5 baby -- or Wi-Fi -- excuse me -- is or is not the baby  
6 of this Arazi patent. So they're asking you two  
7 different pieces to infringement.

8 One is, did Cisco itself infringe? And  
9 the other is, did Cisco induce, and that means cause its  
10 customers to infringe?

11 And they're -- they're going to suggest  
12 to you that that's a no-brainer. But you see my little  
13 reference there to wire cutters that I wrote down there?

14 All of us have been to hardware stores  
15 and all of us have seen in the hardware store section  
16 where you can buy a pair of wire cutters.

17 And if I buy a pair of wire cutters from  
18 the hardware store and I come out to your place and I  
19 cut your fence and I trespass and run off your cattle,  
20 you can get me sure enough, but can you sue the hardware  
21 store because they sold me the wire cutters?

22 You can if the old boy at the hardware  
23 store said, you know what? I know what you're fixing to  
24 do. I know you're going out there to cut Dick Sayles's  
25 fence and to get his cows, and I also know that he's got

1 a six-strand barbed wire fence and that those wire  
2 cutters that you're handling right now won't do the job.  
3 Let me show you something that you really need.

4           That's what they need. That's what they  
5 need to prove that we induced our customers to infringe  
6 this patent that we didn't even know about. So think  
7 about that. And when you do, you'll know that the truth  
8 is that they get three nos there.

9           Let me talk to you about the next set of  
10 questions.

11           How much time have I used, Judge?

12           THE COURT: You've got --

13           MR. CARROLL: 12 minutes?

14           THE COURT: You've got about 12 minutes  
15 left.

16           MR. CARROLL: Okay. Thank you.

17           Now, these are the invalidity issues.  
18 Now, these are the issues you heard a lot of talk about  
19 this morning as to whether this patent, this Arazi  
20 patent, fairly captures Wi-Fi, whether Wi-Fi really is  
21 its baby, different from what that document I showed you  
22 a minute ago said.

23           And Mr. Sayles told you that we had a  
24 bunch of patents that are in evidence, and that's the  
25 truth. And he told you that Judge Everingham has and

1 will tell you that the law is that that's not in -- in  
2 and of itself evidence of non-infringement.

3           But let me tell you what it is evidence  
4 of. It's evidence, again, of what may be the most  
5 important question in this case for you to come to the  
6 truth on, and that is, did the inventors, when they  
7 staked out their claim with the Patent Office, have an  
8 idea that became the patent that fairly described Wi-Fi?  
9 That's what invalidity is. That's -- that's what  
10 enablement is.

11           Can you take that Arazi patent and figure  
12 out how to do what they failed to do?

13           And Mr. Frahn asked a bunch of questions  
14 this morning of Joe McAlexander, and he said, well, gee,  
15 which was it? It's got to be one of two things. Either  
16 those people who came up with this patent, for whatever  
17 reason, were too dense to be taught from their own  
18 patent, or else maybe it didn't teach it in the first  
19 place.

20           And, of course, their -- their response  
21 is no, no, no, that's talking about a product. That's  
22 not talking about the patent. That's talking about a  
23 product.

24           Well, let's see. Let me show you some of  
25 these patents, and I'm not going to talk long at all



1 about these.

2 Pull up Plaintiff's 2, if you would -- I  
3 mean, Slide 2 -- not Plaintiff's 2, our Slide 2.

4 You got that one?

5 Okay. No, Slide 2. The one -- the  
6 side-by-side of the patents. Wait. Hold on just a  
7 minute.

8 I'm going to show it to you now while  
9 I've got it up there. I think it's great.

10 I'm sure you heard this, and I'm sure you  
11 understood what it meant. This is a comparison. This  
12 is a comparison between what Joe McAlexander, their  
13 witness, their professional witness, said over here that  
14 it should take somebody -- what it should take somebody  
15 to be able to apply the teachings of this patent to  
16 Wi-Fi without going over the top.

17 Remember, he said whatever it is, it  
18 can't be over the top. And here's where it actually  
19 took them. But they never even got it done with all of  
20 that.

21 So the significance of this is that even  
22 Joe McAlexander, their paid witness, his standard, this  
23 standard, they busted it. They busted it. So that  
24 means that the patent -- that patent didn't, doesn't,  
25 never will fairly teach Wi-Fi, unless you reinvent it.

1 That's the whole idea of this undue experimentation.

2           You know, since -- since I was six years  
3 old, I have had an idea for time travel, and it's a  
4 great idea. But I haven't made it work yet. I just  
5 haven't worked out all the bugs. You think I could get  
6 a patent on that? And you think I could teach you how  
7 to do time travel?

8           That's what they're saying. They're  
9 saying this is the same kind of thing that they can  
10 stretch that patent wherever they want it to go. That's  
11 not the truth.

12           Let me show you another thing. Let's  
13 call up -- ELMO? Oh, here we go.

14           Now, Tracy, would you please highlight  
15 those cited references?

16           You heard a lot of talk this morning  
17 about these cited references. Let me tell you why  
18 that's important for the validity question.

19           Remember, Mr. McAlexander said that the  
20 Patent Office sorts ideas into buckets or slots, and he  
21 said that the -- that the patent fit a particular slot  
22 that he wanted to talk to you about. Here's something  
23 that he didn't tell you, but you can see with your own  
24 eyes when you get back in that jury room.

25           On the -- on the left is the Arazi

1 patent, the patent they're suing over. On the right is  
2 Bob O'Hara's Wi-Fi patent that he got when he and Pat  
3 Calhoun started Airespace. You'll see that there's no  
4 overlap between the areas that the Patent Office said  
5 they belonged in.

6                   You see what I'm saying? There's no  
7 overlap in the areas that the Patent Office assigned.  
8 Not us, not Bob O'Hara, not Mr. Arazi. The Patent  
9 Office. They were different things. They were  
10 different things.

11                   Let me tell you another thing.

12                   Do we have this Plaintiff's 033 on the --  
13 yeah, 333.

14                   Now, you remember one of the things  
15 they're most proud about here is how many times this  
16 Arazi patent has been cited that is pointed out to other  
17 inventors by the Patent Office, and they said, oh, the  
18 Patent Office told Cisco about this famous, important  
19 patent. And sure enough, they did. They told Cisco  
20 about this Arazi patent, but not in connection with  
21 anything that smelled like, looked like, or tasted like  
22 Wi-Fi.

23                   It was about cell phones. And Cisco went  
24 down there to get a cell phone patent, and the Patent  
25 Office said, you know what? You need to know about this

1 Arazi patent, because it has something to do with what  
2 you're looking at now, cell phones.

3 THE COURT: You've got five minutes  
4 remaining.

5 MR. CARROLL: Thank you, Your Honor.

6 And you know what else? When Bob O'Hara  
7 and Pat Calhoun went down there to get their Wi-Fi  
8 patents -- their Wi-Fi patents, the Patent Office didn't  
9 say one thing about that Arazi patent.

10 Don't you know they would have if it had  
11 had anything to do with Wi-Fi.

12 Now, let me talk to you real quickly  
13 about damages. And by the way, you don't even get to  
14 damages -- you don't even get to damages if you believe  
15 the truth is that this patent has nothing to do with the  
16 way Cisco and Airespace do Wi-Fi. You don't even get to  
17 damages if you believe that the truth is that these  
18 patent -- that this patent was never intended to teach  
19 Wi-Fi and can't teach Wi-Fi. You don't even get there.

20 But if you want to pay them something,  
21 and I hope you don't, I want you to look at the truth of  
22 the damage evidence, because it's pretty -- pretty  
23 stout.

24 Let's look at -- look at Slide -- let's  
25 see, Tracy, give me -- yeah, let's look at Slide 6.

1                   Now, you remember Mr. Becker. Mr. Becker  
2 was the witness I put on. He's a Ph.D. He's an  
3 engineer and he is a paid witness. We paid him to come  
4 down here and give you his opinion.

5                   And one of the most important things that  
6 he told you -- and it's another thing that they're  
7 trying to run away from, because it kills them; it just  
8 murders them. And that is that there is a very  
9 important series of business transactions that tell you  
10 exactly what people were buying and selling licenses for  
11 Wi-Fi, because that's what it was all about.

12                  That's this 802.11. That's the same as  
13 Wi-Fi. And what Becker told you and what the truth is,  
14 is that people who invent Wi-Fi technology -- and there  
15 is a ton of them, hundreds of Wi-Fi inventions, not just  
16 one, not just ours, certainly not that one.

17                  And those people got together and they  
18 figured out what a fair royalty rate would be for people  
19 buying and selling and renting Wi-Fi technology, and  
20 this is what it is.

21                  You remember I drew this the other day  
22 when he was testifying, .12 percent. The people who do  
23 Wi-Fi, that's how they deal with their product. So  
24 Mr. -- or Dr. Becker came up with .5 percent, because he  
25 didn't -- he didn't want to accept this on its face,

1 because he said it wouldn't be reasonable because Commil  
2 wasn't in that business, or actually Mr. David.

3 So he said, I'm going to give them a  
4 little bit more, and he did. But guess what? It is not  
5 the 10 times -- the 10 times that their fellow,  
6 Mr. Carlile, wants. And let's talk real quickly about  
7 Mr. Carlile.

8 Bring up, Tracy, that piece of  
9 Mr. Carlile's transcript.

10 You know, Mr. Carlile is a CPA. And you  
11 remember one of the things that we caught him on, and I  
12 called him out on, was the fact that what he told you  
13 was half of the truth. Was half of the truth.

14 And Becker told you what the full truth  
15 was, and I asked him, I said, does that embarrass you as  
16 a CPA that you didn't have all the information and that  
17 we pointed it out to the jury? What was his answer?  
18 It happens all the time. It happens all the time.

19 Is that the kind of attitude that you're  
20 going to base a 56-million-dollar jackpot on?

21 THE COURT: You've used your time,  
22 Mr. Carroll.

23 MR. CARROLL: Thank you, Your Honor.  
24 Thank you, Your Honor.

25 So we suggest 3 to \$5 million, if you get

1 to damages.

2 Thank you, Your Honor.

3 MR. WERBNER: May I move this before --

4 MR. CARROLL: Yeah, I'll be glad to move  
5 it.

6 MR. WERBNER: And there's a few slides.

7 That won't come off my time, Your Honor,  
8 or I'll start -- there's a few things here that --

9 MR. CARROLL: I'll be glad to.

10 MR. WERBNER: Okay. Thank you.

11 MR. CARROLL: You're welcome. Thank you.  
12 Those aren't mine.

13 MR. WERBNER: Oh. Not mine.

14 May it please the Court, Your Honor.

15 THE COURT: Mr. Werbner.

16 MR. WERBNER: Good afternoon.

17 Cisco put all their eggs in one basket.  
18 They called one technical expert, Dr. Lansford. They  
19 put all their eggs in that basket, and it turned out he  
20 gutted their case.

21 We'll look at the slide -- he said a  
22 bunch of things, but I'm going to move quickly here. He  
23 ended up on cross-examination saying: This patent is  
24 not limited to telephony.

25 You'll see that in the Court's

1 instructions in a few minutes.

2           He said: This patent isn't really  
3 limited to Bluetooth. It's just a preferred embodiment.  
4 You have to look and see if it's a short-range  
5 communication protocol.

6           And he said: No, I'm not saying that  
7 this patent isn't valid. I'm not saying that. I assume  
8 that it is valid.

9           QUESTION: Are you going to argue with  
10 the U.S. Patent Office who said it was valid?

11           ANSWER: No, I'm not.

12           And, folks, when Mr. Carroll says: Look  
13 through that patent. You'll look and look. Is the word  
14 Wi-Fi anywhere in there?

15           It doesn't have to be in there. The  
16 Judge isn't going to tell you that. We wouldn't have  
17 needed a trial if it turned around that.

18           The simple question on that issue is, and  
19 it has been -- unless Mr. Carroll gets successful at his  
20 efforts to distract you through the smoke and mirrors,  
21 is simply this: Is Wi-Fi a short-range communication  
22 protocol?

23           The patent says on its face that it is  
24 applicable to short-range communication protocols. And  
25 the clear evidence is that it is. Even Dr. Lansford,



1 again, guts their case and says: Yeah, under Part 15 of  
2 the FCC regulations, the Federal Communication  
3 Commission, what's right in there together under  
4 short-range communication protocol? Bluetooth and  
5 Wi-Fi.

6           The Judge told you over and over, as they  
7 attempted to put smoke and mirrors in front of you, that  
8 the preferred embodiment, the Bluetooth, does not limit  
9 the scope of the patent.

10           So the question is simple: Is Wi-Fi a  
11 short-range communication protocol?

12           That's why they tried to say: Oh, it can  
13 go a thousand miles to Memphis until we pointed out the  
14 only way you can do that is with a wire; until we  
15 pointed out that the patent talks about the short-range  
16 communication being between the user and the access  
17 point, not between the switch and some other place.

18           If you'll watch all the smoke and mirrors  
19 and blow it away, this case becomes simple. All the  
20 name calling, all the finger pointing is intended to  
21 take your eye off the ball.

22           And let me tell you about Mr. Arazi.  
23 They spent 15 minutes on that. And they say: Oh, we  
24 misled them, and Mr. Sayles or Mr. Werbner promised us  
25 that we could count on them.

1                   That's just not true. You have to trust  
2 me on this. You've seen this for a week. Do you think  
3 Mr. Sayles or I would mislead, misrepresent, as officers  
4 of this Court?

5                   They had three volumes of his videotaped  
6 deposition. They didn't play a word of it. And  
7 Mr. Carroll says: Well, that's because he would have  
8 said something bad. That's ridiculous. That's the  
9 strength of their case.

10                  They could have played that deposition,  
11 three volumes. And he says: Well, no. It's the  
12 witness stand here that's important to you folks.

13                  We brought you plenty of those. They  
14 played depositions of Mr. Cohen, of Mr. Barak. They  
15 know how to push the button with their high-tech people  
16 and turn on Mr. Arazi's video, if they want.

17                  Again, smoke and mirrors. Don't be  
18 distracted.

19                  Now, this case, from day one, has been  
20 about damage control by Cisco. They know they're guilty  
21 of infringement. They know they violated this patent.  
22 They're arrogant about it.

23                  You can see here at the very end, what do  
24 they do? I don't even -- 3 million, 5 million. They  
25 know they're guilty. It's been about damages.

1                   Y'all have sat here for a week and a day  
2 because they want to take a chance and see if maybe they  
3 can save themselves a few million dollars. Maybe they  
4 can get it down to 40 or 30 or 20.

5                   That's what this case has all been about,  
6 and I ask you not to reward their smoke and mirrors by  
7 taking anything less than what you believed to be a  
8 reasonable royalty.

9                   And Roger Carlile, despite how they like  
10 to take things out of context, pull out one sentence out  
11 of two hours of testimony, and try to, again, pull the  
12 wool over your eye, you know he was a solid,  
13 professional, experienced CPA who studied everything,  
14 had plenty of comparables, and came up with a reasonable  
15 rate of 5 percent.

16                  Their Dr. Becker, he spent the first 30  
17 minutes pushing the figures down to a tenth of that.  
18 How? By telling you that it didn't apply to telephony.  
19 He went for almost an hour justifying the .5 percent  
20 because he said: Well, if you look at the sales and the  
21 rates, only 5 percent of the customers buy this device  
22 or use it for telephones.

23                  Well, you're going to see the Judge give  
24 you a very clear instruction. After he talks about  
25 switches and apparatus to route telephone calls, he

1 says -- he's going to say to you very clearly: It is  
2 not limited to telephone calls. That's what  
3 Dr. Lansford has said.

4                   So then what does Dr. Becker do? He  
5 says: Well, I've got some comps. But the first one he  
6 starts with, Qualcomm, though there were 346 patents,  
7 each and every one of them called for a royalty of 5.75  
8 percent.

9                   So Becker, who's working for these folks,  
10 says: Oops, that's not going to work. The telephone  
11 thing may not sell if the Judge instructs the jury the  
12 way that he is. Whoops, 5.75 percent.

13                   He starts and plays some dishonest math  
14 and divides it by 350 without any explanation. And then  
15 he has the gall to come in and say, when it comes out .6  
16 percent: Oh, generously, I'm going to put that at the  
17 top.

18                   That is just dishonest math, and it's a  
19 shame that a CPA would do that. That 5.75 supports it.  
20 And another reason, as credible -- you are the judge of  
21 the honesty of these witnesses and the persuasiveness of  
22 these witnesses. You know, what else did he do? What  
23 else did he do?

24                   He says that when we -- he was asked in  
25 his deposition: Did you go into the Royal Source -- the

1 | Royalty Source book like Dr. -- like Mr. Carlile?

2 In his deposition, when he was asked:  
3 Did you search that? Because Roger Carlile knew it  
4 would be full of other licenses to support the 5  
5 percent.

6 And Mr. Becker says: No, I didn't search  
7 through there.

8 But then we find out that he has the 5.75  
9 percent Qualcomm license, and he goes: Whoops. Because  
10 that's the one that he had to somehow get rid of to  
11 justify pushing this down below 5 percent, and he tried  
12 to explain that in front of -- to you. Well, I just  
13 didn't search that database. I made a request of the  
14 database.

15                   Now, talk about word games and dishonesty  
16 and who's advocating for who, you can see right there  
17 why their damages are not reliable.

18                   Let's talk about that hypothetical  
19 negotiation. That is in the context, in March of '05,  
20 that Cisco and Commil are in a room negotiating under  
21 what circumstances per the law? They have to reach an  
22 agreement. Nobody can walk out. They have to reach a  
23 royalty agreement, and they have to assume that they are  
24 infringing a valid patent.

25 | At that point in time, having sunk \$450

1 million into Airespace and foreseeing billions of  
2 dollars of sales, do you think Cisco was going to walk  
3 out of that room caught in that situation, infringing a  
4 valid patent and -- because they wouldn't pay 5 percent;  
5 they weren't going to say a nickel on the dollar?

6           You think they would have walked out of  
7 the room and stopped their sales of these products  
8 because they couldn't get it for 1 percent or 2 percent  
9 or 3 percent? Ridiculous.

10           They happily would have paid 5 percent or  
11 more having sunk the 450 million into a market that they  
12 knew was going to explode, and the documents support  
13 that.

14           You know, the choice is simple. You can  
15 go on what Cisco's documents say the design and  
16 architecture of the product is, or you can go with what  
17 sort of their evasive, change their testimony, one thing  
18 before the break, one thing after the break.

19           Use your common sense. I trust you. I  
20 know what you're going to do. You're going to hold them  
21 to what their documents say. Some of this is technical,  
22 you know. And it can be -- somebody can pull out  
23 Table 2 or somebody can pull out a word here.

24           Not just one, but document after document  
25 shows that this split-MAC architecture, the way it was

1 divided on the real-time, all the real-time in one  
2 place, the other in the other is -- is done just the way  
3 the patent calls for.

4           Earlier I mentioned that there was a  
5 place in the patent that I didn't have the citation  
6 to -- that was this morning -- that allows some of the  
7 functions to be in the other place, and I want to give  
8 you that citation.

9           I think that I -- I have it here. I'll  
10 come back to it, if I don't. No. It's Column 16,  
11 Line 11. That's an important one. That one actually  
12 says that, yes, the instances are created as necessary  
13 on an as-needed basis.

14           And I wanted you to have that in your  
15 notes; otherwise, you can look through all of it.

16           I want to turn from the damages to this  
17 issue of -- and let's do 1904 -- inducement.

18           Obviously, the answer is, they directly  
19 infringe. They use it in their corporate headquarters.  
20 They test it. They turn it on. They go out to places  
21 like Berkeley -- that is, Cisco -- and they help the  
22 customer.

23           And the question is: Do they, as part of  
24 that, know or should have known of the infringing use?  
25 Let's also look at 1905.

1                   Of course they knew or should have known.  
2 The Patent Office cited the '395 patent to them in 2004,  
3 and what did they do? Did one witness come up here and  
4 explain to you what -- did they read it? Did they  
5 search it? Did they pay any attention?

6                   At best case, they ignored the '395  
7 patent that the Patent Office cited to them. And here  
8 on inducement, Mr. O'Hara himself -- this is a direct  
9 quote from the transcript.

10                  QUESTION: With the sales effort that  
11 y'all were engaged in, did you do all this to your  
12 customers to induce them to purchase it?

13                  ANSWER: Yes.

14                  QUESTION: And you were doing that to  
15 make these sales.

16                  And they did it at a time that they had  
17 the patent. And we're not like a hardware store.  
18 That's a ridiculous example. We're not suing anybody  
19 but Cisco. We're not suing these customers.

20                  It was Cisco that induced them. It was  
21 Cisco that touted the features of this split-MAC  
22 architecture. It was Cisco that told them: Use it this  
23 way. This is the preferred way. We've got it divided.  
24 We've eliminated the gaps. There's no mobility. You  
25 can control it. You want to have a switch in your



1 system.

2           Of course they induced it.

3           You know, this idea that a copy running  
4 an instance, it's really, really silly, and your common  
5 sense will tell you this, that this patent does not  
6 require for 200 people that are connected or 20 people  
7 that are connected, that you have to have 20 copies of  
8 the software. This patent doesn't say that.

9           One word in that last paragraph they  
10 never mention is running an instance, running a copy.

11           And you'll see that in that paragraph  
12 there, if they had to have -- no skilled artisan would  
13 read this patent to say you have to have a hundred  
14 processors in there all running at the same time.

15           This access point would have been the  
16 size of a beach ball. And because it would have been  
17 consuming so much power, people would have had to drag  
18 it along, something the size of -- well, less than this  
19 podium to power up that huge access point.

20           That's not reasonable. You were told  
21 what a reasonable interpretation is, and they created  
22 instances as necessary. They ran the processor, when it  
23 was needed, one at a time for each connection.

24           And I think all you have to do is ask  
25 yourself: Is what they're saying that you have to have

1 200 copies of something like we explained with the  
2 Internet Explorer or something else? It just doesn't  
3 make sense.

4                   And a credible witness, Mr. McAlexander,  
5 took you step by step, talked about the state tables,  
6 talked about the parameters and the other things to show  
7 you that that's what someone that was skilled in network  
8 communications would certainly understand that to be.  
9 You know, there was talk about the wire cutters and  
10 everything else. I think, though, that in all this  
11 noise, there's been some deafening silence, and that is  
12 any explanation about Plaintiff's 333.

13                   How come they had in their files a  
14 patent, before all of this started, that directs them  
15 right to this patent? How come?

16                   THE COURT: You've got five minutes.

17                   MR. WERNER: Thank you, Your Honor.

18                   Not a word of explanation. Not one  
19 witness that got up there to explain that. And you  
20 remember that 333 patent.

21                   If we can blow up the abstract.

22                   Mr. Carroll says: Oh, that's -- you  
23 know, that's unrelated.

24                   Well, the lawyers' comments aren't  
25 testimony. Where's their witness that says it isn't

1 related?

2                   What I heard from their employee is that  
3 you see the words base stations; you see the word  
4 wireless communications; you see the word clock; you see  
5 synchronization; you see all those kind of words.  
6 And their witness admitted, yeah, there are a lot of  
7 similarities between that. Certainly, enough  
8 similarities for a company the size of Cisco to at least  
9 read it and understand if that limited them in any way.  
10 But what this company decided to do is either ignore it  
11 or just brush it aside like they've tried to brush away  
12 other people when they stand between them and their  
13 billion dollars.

14                   They brush this aside, and they went  
15 ahead, and they went right through that fence, and they  
16 trespassed on the property of others.

17                   And then they figured, if we get caught,  
18 maybe they didn't think this little company in Israel,  
19 once they looked into it, would have the wherewithal to  
20 come over here.

21                   But, fortunately, those inventors had an  
22 advocate who believed in them and who believed in the  
23 patent and who put his money behind it and would enforce  
24 it, and so now they're caught here redhanded, and they  
25 just want to see if they can walk out of here with

1 something less than a fair reasonable royalty of 5  
2 percent.

3                   And if you -- they're going to want you  
4 to split the baby. They know that -- well, let's see if  
5 we can go here. That's why they pushed down so  
6 artificially the number. Well, maybe the jury will  
7 split the baby.

8                   You know, that wasn't wise at the time of  
9 King Solomon. It's not wise today. And if you cut  
10 these damages when you understand that 5 percent, in  
11 this hypothetical negotiation, is fair and reasonable,  
12 they will be doing high fives on their corporate jet all  
13 the way back to the Silicon Valley.

14                   And I don't think you want to do that. I  
15 think you want to send them a different message. I  
16 think you want to send them a message that people's  
17 property rights are important.

18                   And when the Patent Office issues a  
19 patent, he can make all kinds of fun of it; he can come  
20 over here and bow down and call it a shrine; but it's  
21 been issued for 10 years. Not once has it been  
22 challenged, not once has the -- even Cisco gone to the  
23 Patent Office and said it's invalid.

24                   It's been cited 50 or 60 times, but they  
25 hope that some smoke and mirrors will cause you to do

1 differently.

2           You know, the problem is, they just won't  
3 accept responsibility. They won't accept  
4 responsibility. But I ask you to require them, require  
5 them to pay what the law says: No less than a  
6 reasonable royalty.

7           If you will do that, we will be grateful,  
8 and that will be fair, and you can go home knowing that  
9 you did what was right, and you can feel good about what  
10 you did.

11           No one's here to win a jackpot. No one's  
12 here to go do the other mischaracterizations that Mr.  
13 Carroll said. We're here for the inventors, with the  
14 inventors, with the investor, with the company to ask  
15 you to do what the law allows a property owner to do and  
16 have a fair and reasonable royalty.

17           You know, Mr. Sayles and I have spent a  
18 lot of time bringing you this. If we hadn't been here  
19 to cross-examine these witnesses, you wouldn't have  
20 gotten the whole story.

21           THE COURT: You've got one minute.

22           MR. WERBNER: Thank you.

23           They were coached. They all sounded  
24 alike. And only on cross-examination did the whole  
25 story come out.

1                   Someone's trying to pull the wool over  
2 your eyes. We can't do any more. It's your time to go  
3 back into the jury room and send a message by answering  
4 these questions: Yes, it was infringed directly and  
5 through inducement.

6                   And no, this isn't an invalid patent. It  
7 was enabled. There was a written description. That's  
8 what the Patent Office determined, and that's even what  
9 one of their witnesses acknowledged.

10                  And the damages should be 5 percent which  
11 translates into \$56,184,000.

12                  Thank you very much.

13                  THE COURT: Ladies and Gentlemen of the  
14 Jury, you have heard the evidence presented by the  
15 parties to this suit and the argument of the respective  
16 attorneys in support of their positions.

17                  It is now my duty to give you the charge  
18 in this case. It will be an oral charge and is given in  
19 an effort to assist you in your deliberation in deciding  
20 the issues which you must decide in order to reach a  
21 fair and impartial verdict in this case.

22                  Perhaps this function of the Court is the  
23 most important one that the Court performs in the trial  
24 of a case, so I ask you to pay close attention to my  
25 remarks.

1           You will remember that at the beginning  
2 of the trial, I gave you some general instructions and  
3 definitions. Rather than repeat them, I ask you to  
4 recall them now in deciding the facts and issues which  
5 you are to decide.

6           As I instructed you at the beginning of  
7 the trial, you are the exclusive judges of the facts,  
8 the credibility of the evidence, and the weight to be  
9 given the testimony of the witnesses.

10           You are to perform your duty without bias  
11 or prejudice to any party. The law does not permit  
12 jurors to be governed by sympathy or prejudice.

13           A corporation and all other persons are  
14 equal before the law and must be treated as equals in a  
15 court of justice.

16           The Court and the parties expect that you  
17 will carefully and impartially consider all of the  
18 evidence, follow the law, as I will give it to you, and  
19 reach a just verdict.

20           You are instructed that all persons,  
21 including the Plaintiff and the Defendant in this case,  
22 stand equal before the law and are to be dealt with  
23 equal in this Court. The law is no respecter as  
24 persons.

25           I will now briefly review the contentions

1 of the parties and give you some additional instructions  
2 and definitions that will guide you in deciding the  
3 issues or facts that you must resolve in this case.

4           With respect to the Plaintiff's claims  
5 and the Defendant's defenses, the Plaintiff, Commil USA,  
6 LLC (or Commil) alleges that the Defendant, Cisco  
7 Systems, Inc. (Cisco) infringes certain claims of its  
8 United States Patent No. 6,430,395. We've referred to  
9 it as the '395 patent.

10           Specifically, Commil contends that Cisco  
11 infringes Claims 1, 4, and 6 of the '395 patent by  
12 making, using, selling, or offering to sell the  
13 following:

14           Cisco's 500 Series Wireless Mobility  
15 Express Controller; 2000 Series WLAN Controller; 2100  
16 Series WLAN Controller; 3750 Series WLAN Controller;  
17 4400 Series WLAN Controller; 6500 and 7500 Series  
18 Wireless Service Module; Wireless LAN Controller Module;  
19 500 Series Express Mobility LAP; 1000 Series LAPs; 1100  
20 Series LAPs; 1130 G Series LAPs; 1130 AG Series LAPs;  
21 1200 Series LAPs; 1230 AG Series LAPs; 1240 AG Series  
22 LAPs; 1250 Series LAPs; 1300 Series LAPs; and 1500  
23 Series LAPs.

24           Commil alleges that Cisco directly  
25 infringes Claims 1, 4, and 6 by using the patented



1 | methods.

2 Commil also alleges that Cisco induces  
3 infringement of Claims 1, 4, and 6 of the '395 patent by  
4 encouraging others to use the accused products in an  
5 infringing manner.

6 Commil seeks damages in the form of a  
7 reasonable royalty to compensate it for the alleged  
8 infringement.

9                   Now, Cisco denies Commil's allegations of  
10 infringement. Specifically, Cisco denies that it  
11 directly infringes the asserted claims of the patent.  
12 Next, Cisco denies that it induces infringement of the  
13 asserted claims.

14                   Finally, Cisco contends that Claims 1, 4,  
15 and 6 of the '395 patent are invalid for failure to  
16 satisfy the written description requirement and for lack  
17 of enablement.

18                   Commil bears the burden of proof by a  
19 preponderance of the evidence that Cisco directly  
20 infringes or induces the infringement of the asserted  
21 claims of the '395 patent.

22 Commil also has the burden of proving by  
23 a preponderance of the evidence the amount of damages  
24 caused by Cisco's alleged infringement.

25 Cisco bears the burden of proof by clear

1 and convincing evidence that the claims of the  
2 patent-in-suit are invalid.

3 I'll now give you some instructions and  
4 definitions to help you in answering the questions to  
5 follow.

6 With respect to claim interpretation, to  
7 decide the questions of infringement and invalidity, you  
8 must first understand what the claims of the patent  
9 cover; that is, what they prevent anyone else from  
10 doing. This is called claim interpretation.

11 It is my duty under the law to interpret  
12 what the words used in the claims of the '395 patent  
13 mean. I have made my determination, and I will instruct  
14 you accordingly. You must apply the meaning I give the  
15 patent claims to your decision on infringement and  
16 invalidity.

17 I'll now instruct you how those words are  
18 to be construed and understood when deciding the issues  
19 of infringement and invalidity.

20 Now, the term mobile unit means a  
21 wireless communication device.

22 The term base station means  
23 transmitting/receiving station in a wireless local  
24 network that is fixed in location.

25 The term switch means an apparatus for

1 routing telephone calls. You are instructed, however,  
2 that the invention is not limited to making telephone  
3 calls.

4           What the claims require is the  
5 performance of the steps in the method in a wireless  
6 communication system having at least two base stations  
7 in communication with at least one switch as these terms  
8 have been defined by the Court.

9           The term communication protocol means a  
10 set of procedures required to initiate and maintain  
11 communication between two or more devices.

12           The term a short-range communication  
13 protocol means a set of procedures required to initiate  
14 and maintain short-range communication between two or  
15 more devices.

16           The term accurate time synchronization  
17 means the state of two devices, each having an internal  
18 clock, wherein the calculated time of one clock is  
19 equivalent to the other clock's time with a precision  
20 commonly found in such devices.

21           The term low-level protocol for  
22 performing tasks that require accurate time  
23 synchronization means a protocol for performing tasks  
24 that require accurate time synchronization or real-time  
25 capabilities.

1           The term high-level protocol, which does  
2 not require accurate time synchronization, means a  
3 protocol for performing tasks that do not require  
4 accurate time synchronization or real-time capabilities.

5           The term connected means in wireless  
6 communication with.

7           The term for each connection of a mobile  
8 unit with a base station running an instance of the  
9 low-level protocol at the base station connected with a  
10 mobility unit and running an instance of the high-level  
11 protocol at the switch means for each connection of a  
12 mobile unit with a base station running at the base  
13 station a copy of the low-level protocol supporting only  
14 that connection and running at the switch a  
15 corresponding separate copy of the high-level protocol  
16 supporting only that connection.

17           Now, I have previously provided you with  
18 a copy of these definitions, and you can use them during  
19 your deliberations.

20           With respect to determining infringement,  
21 once the patent is issued, the owner of a patent has the  
22 right to exclude others from making, using, offering to  
23 sell, or selling the patented invention throughout the  
24 United States or importing the patented invention into  
25 the United States for a term of 20 years.

1           Thus, infringement occurs when a person,  
2 without the owner's permission, makes, uses, offers to  
3 sell, or sells the patented invention anywhere in the  
4 United States or imports the patented invention into the  
5 United States while the patent is in force.

6           To determine whether there is an  
7 infringement, you must compare the allegedly infringing  
8 product with the scope of the patent claims as I have  
9 defined them for you.

10           In order to infringe a patent -- patent  
11 claim covering a method, a person must perform each and  
12 every step of the method.

13           In determining whether Cisco infringes  
14 Commil's asserted claims, you must determine whether  
15 Cisco's accused products or their methods of use perform  
16 each and every limitation recited in a claim.

17           To prove direct infringement of a patent  
18 claim, Commil must prove by a preponderance of the  
19 evidence that Cisco performed every step in that claim.

20           A claim limitation is present if it  
21 exists in the accused method practiced by Cisco just as  
22 it is described in the claim language, either as I have  
23 explained that language to you, or if I did not explain  
24 it, as it would be understood by one of ordinary skill  
25 in the art.

1           If the accused methods omit even a single  
2 limitation, then you must find that the claim is not  
3 infringed.

4           You must consider each of the patent  
5 claims separately. If you find that each and every  
6 limitation of a patented claim is performed, then the  
7 claim is infringed, even if the accused methods of use  
8 may be more or less frequent or may include additional  
9 features or functions not found in the claims.

10           Whether or not Cisco knew that what it  
11 was doing was an infringement does not matter for direct  
12 infringement. A person may be found to be a direct  
13 infringer of a patent even if he or she believed in good  
14 faith that what he or she was doing was not an  
15 infringement of any patent and even if he or she did not  
16 even know of the patent.

17           Let's talk about joint infringement.

18           Direct infringement requires a single  
19 party to perform each and every step of a claimed  
20 method.

21           Where no single party performs each and  
22 every step of a claimed method but multiple parties  
23 combine to perform all steps of a method, that claim  
24 will be directly infringed if one party exercises  
25 control or direction over the entire method so that

1 every step is attributable to the controlling party.

2           With respect to induced infringement,  
3 Commil asserts that Cisco has induced infringement of  
4 the asserted claims.

5           To show inducement, Commil must prove by  
6 a preponderance of the evidence that a third party has  
7 directly infringed the patent. If there is no direct  
8 infringement by a third party, Cisco has not induced  
9 infringement.

10           If you find that a third party has  
11 directly infringed Claims 1, 4, or 6 of the '395 patent,  
12 it is not necessary to show that Cisco itself has  
13 directly infringed, if Commil proves by a preponderance  
14 of the evidence that Cisco actively and knowingly aided  
15 and abetted that direct infringement.

16           Furthermore, Commil must show that Cisco  
17 actually intended to cause the acts that constitute  
18 direct infringement and that Cisco knew or should have  
19 known that its actions would induce actual infringement.  
20 Inducing third-party infringement cannot occur  
21 unintentionally. This is different from direct  
22 infringement, which can occur unintentionally.

23           Cisco also cannot be liable for inducing  
24 infringement if it had no reason to be aware of the  
25 existence of the patent.

1                   If you find that a third party has  
2 directly infringed Claims 1, 4, or 6 of the '395 patent  
3 and that Cisco knew or should have known that its  
4 actions would induce direct infringement, you may find  
5 that Cisco induced another to infringe Commil's patents,  
6 if it provided instructions and directions to perform  
7 the infringing act through labels, advertising, or other  
8 sales methods.

9                   You may also find that Cisco induced  
10 infringement by supplying the components that are used  
11 in an infringing manner with the knowledge and intent  
12 that its customer would directly infringe by using the  
13 components to make, use, or sell the patented invention.  
14 The asserted claims use the word comprising. When a  
15 claim uses the word comprising, comprising means  
16 including or containing.

17                  A claim that uses the word comprising or  
18 comprises is not limited to products or methods having  
19 only the elements that are recited in the claim but also  
20 covers products or methods that add additional elements.

21                  Let's take an example of a claim that  
22 covers a table. If the claim recites a table comprising  
23 a tabletop, legs, and glue, the claim will cover any  
24 table that contains these structures, even if the table  
25 also contains other structures, such as a leaf or wheels



1 on the legs.

2           With respect to dependent claims, my  
3 instructions on infringement so far have related to  
4 independent claims. Patent claims may exist in two  
5 forms referred to as independent claims and dependent  
6 claims.

7           An independent claim does not refer to  
8 any other claim of the patent. Thus, it is not  
9 necessary to look at any other claim to determine what  
10 an independent claim covers. Claim 1 of the '395 patent  
11 is an independent claim.

12           A dependent claim refers to at least one  
13 other claim in the patent. A dependent claim includes  
14 each of the elements of the other claims to which it  
15 refers, plus additional elements recited in the  
16 dependent claim itself.

17           Claims 4 and 6 of the '395 patent are  
18 dependent claims that depend on Claim 1. In order for  
19 you to find that Claims 4 or 6 of the '395 patent are  
20 infringed, you must first find that Claim 1 is  
21 infringed.

22           If you find that independent Claim 1 of  
23 the '395 patent is not infringed, you must also find  
24 that dependent Claims 4 and 6 are not infringed.

25           Now, with respect to validity, Cisco

1 contends that the asserted claims of Commil's '395  
2 patent are not valid.

3           A patent issued by the United States  
4 Patent Office is presumed to be valid. In order to  
5 rebut this presumption, the Defendant must establish by  
6 clear and convincing evidence that the Plaintiff's  
7 patent or any claim in the patent is not valid.

8           As I have instructed you earlier, clear  
9 and convincing evidence is a more exacting standard of  
10 proof than proof by a preponderance of the evidence,  
11 which only requires that the parties' claim be more  
12 likely true than not true.

13           Nevertheless, the clear and convincing  
14 standard is not as high as the burden of proof applied  
15 in a criminal case, which is beyond a reasonable doubt.  
16 Each claim of the patent is presumed valid regardless of  
17 the status of any other claim in the patent.  
18 Cisco contends that the asserted claims are invalid  
19 because they do not meet the enablement and written  
20 description requirements.

21           You should analyze each claim separately.  
22 If you find by clear and convincing evidence that a  
23 claim is not enabled or lacks a sufficient written  
24 description, then you should find that claim invalid and  
25 render a verdict for Cisco on that claim.

1                   With respect to enablement, Cisco  
2 contends that the asserted claims are not enabled.

3                   The specification set forth in a patent  
4 must disclose sufficient information to enable one of  
5 ordinary skill in the field of the invention, at the  
6 time the patent application was filed, to make and use  
7 the full scope of the claimed invention.

8                   This requirement is known as the  
9 enablement requirement. If a patent claim is not  
10 enabled, it is invalid.

11                  In considering whether the specification  
12 of a patent satisfies the enablement requirement, you  
13 must keep in mind that patents are written for persons  
14 of skill in the field of the invention.

15                  Thus, a patent need not expressly state  
16 information that skilled persons would -- would be  
17 likely to know or could obtain.

18                  The Defendant bears the burden of  
19 establishing lack of enablement by clear and convincing  
20 evidence. The specification is enabling so long as  
21 undue experimentation is not needed to make or use the  
22 invention.

23                  The fact that some experimentation may be  
24 required for a skilled person to make or use the claimed  
25 invention does not mean that a patent's specification

1 fails to meet the enablement requirement.

2 Factors that you may consider in  
3 determining whether the specification would require  
4 undue experimentation include:

5 (1) the quantity of experimentation  
6 necessary;

7 (2) the amount of direction or guidance  
8 disclosed in the patent;

9 (3) the presence or absence of working  
10 examples in the patent;

11 (4) the nature of the invention;

12 (5) the state of the prior art;

13 (6) the relative skill of those in the  
14 art;

15 (7) the predictability of the art;

16 And (8) the breadth of the claims.

17 With respect to the written description,  
18 Cisco also contends that the patent does not contain an  
19 adequate written description of the claimed invention.  
20 The purpose of this written description requirement is  
21 to make sure that a patent describes the technology it  
22 seeks to claim as an invention and to demonstrate that  
23 the inventor was in possession of the invention at the  
24 time the application for the patent was filed, even  
25 though the claims may have changed or new claims added

1 during the prosecution of the application.

2           The written description requirement is  
3 satisfied if a person of ordinary skill in the field  
4 reading the patent application, as originally filed,  
5 would recognize that the patent application described  
6 the invention as claimed, even though the description  
7 may not use the exact words found in the claim.

8           It is not necessary that each and every  
9 aspect of the claim be discussed, as long as a person of  
10 ordinary skill would understand that the missing aspect  
11 is necessarily implied in the patent application as  
12 originally filed.

13           If you find by clear and convincing  
14 evidence that the patent does not contain an adequate  
15 written description of the claimed invention, then you  
16 should render a verdict for Cisco.

17           With respect to damages, I will now  
18 instruct you as to the calculation of damages should you  
19 find that Commil has met its burden on any of its  
20 claims.

21           If you find that Cisco has infringed any  
22 of the asserted claims of Commil's patent and that these  
23 claims are valid, then you should consider the amount of  
24 money Commil should receive as damages.

25           Commil has the burden of proof by proving

1 by a preponderance of the evidence the amount of damages  
2 caused by Cisco's conduct. The owner of a patent is  
3 entitled an award of damages adequate to compensate for  
4 the infringement, but in no event less than a reasonable  
5 royalty for the use Cisco made of the invention.

6 Commil is asking for damages in the  
7 amount of a reasonable royalty. Generally, a reasonable  
8 royalty is defined by the patent laws as the reasonable  
9 amount that someone wanting to use the patented  
10 invention should expect to pay to the patent owner and  
11 the owner should expect to receive.

12 A royalty is the amount of money a  
13 licensee pays to a patent owner for each article the  
14 licensee makes or uses or sells or offers to sell under  
15 the patent or for the right to used the claimed method.

16 A reasonable royalty is the amount of  
17 money a willing patent owner and a willing prospective  
18 licensee would have agreed upon at the time of the  
19 infringement for a license to make, use, sell, or offer  
20 to sell the claimed invention.

21 In making your determination of the  
22 amount of a reasonable royalty, it is important that you  
23 focus on the time period when the infringer first  
24 infringed the patent and the facts that existed at that  
25 time.

1           Your determination does not depend on the  
2 actual willingness of the parties to this lawsuit to  
3 engage in such negotiations. Your focus should be on  
4 what the parties' expectations would have been had they  
5 entered negotiations for royalties at the time of the  
6 infringing activity.

7           It is the royalty that would have  
8 resulted from an arm's-length negotiation between a  
9 willing licensor and a willing licensee, assuming both  
10 parties believe the patent claim in question to be valid  
11 and infringed.

12           In determining the reasonable royalty,  
13 you should consider all of the facts known and available  
14 to the parties at the time the infringement began.  
15 Some of the kinds of factors that you may consider in  
16 making your determination are:

17           (1) whether the patent-holder had an  
18 established royalty for the invention; in the absence of  
19 such a licensing history, any royalty arrangements that  
20 were generally used and recognized in the particular  
21 industry at that time;

22           (2) the nature of the commercial  
23 relationship between the patent owner and the licensee,  
24 such as whether they were competitors or whether their  
25 relationship was that of an inventor and a promoter;

1                   (3) the established profitability of the  
2 patented product, its commercial success, and its  
3 popularity at the time;

4                   (4) whether the patent owner had an  
5 established policy of granting licenses or retaining the  
6 patented invention as its exclusive right or whether the  
7 patent-holder had a policy of granting licenses under  
8 special conditions designed to preserve its monopoly;

9                   (5) the size of the anticipated market  
10 for the invention at the time the infringement began;

11                   (6) the duration of the patent and of the  
12 license, as well as the terms and scope of the license,  
13 such as whether it's exclusive or nonexclusive or  
14 subject to territorial restrictions;

15                   (7) the rates paid by the licensee for  
16 the use of other patents comparable to Commil's patent;

17                   (8) whether the licensee's sales of the  
18 patented invention promotes sales of its other products  
19 and whether the invention generates sales to the  
20 inventor of its nonpatented items;

21                   (9) the utility and advantages of the  
22 patent property over the old modes or devices, if any,  
23 that had been used for working out similar results;

24                   (10) the extent to which the infringer  
25 used the invention and any evidence probative of the



1 value of such use;

2 (11) the portion of the profits in the  
3 particular business that are customarily attributable to  
4 the use of the invention or analogous inventions;

5 (12) the portion of the profits that  
6 should be credited to the invention as distinguished  
7 from nonpatented elements, the manufacturing process,  
8 business risks, or significant features or improvements  
9 added by the infringer;

10 (13) the opinion and testimony of  
11 qualified experts and of the patent-holder;

12 And finally (14) any other factors which,  
13 in your mind, would have increased or decreased the  
14 royalty the infringer would have been willing to pay and  
15 the patent owner would have been willing to accept  
16 acting as normally prudent business people.

17 If you find that Cisco has directly  
18 infringed the '395 patent, you should award Commil  
19 damages for those acts of infringement that occurred  
20 after Cisco acquired Airespace in March 2005.

21 As I explained earlier, a defendant may  
22 be liable for indirectly -- for indirectly infringing a  
23 patent claim by inducing the direct infringement of  
24 another.

25 Damages for induced infringement are

1 limited to the extent of direct infringement you have  
2 found. Damages for inducing infringement should be  
3 calculated only as of the date you determine Cisco  
4 actually knew of the '395 patent.

5           You must not award Commil more damages  
6 than are adequate to compensate for the infringement nor  
7 shall you include any additional amount for the purpose  
8 of punishing Cisco or setting an example.

9           You may not include damages that are  
10 speculative, damages that are only possible, or damages  
11 that are based on guesswork.

12           I've got some final instruction now.

13           Nothing that I may have said or done  
14 during the course of this trial is indicated -- or is  
15 intended to indicate any view of mine as to which party  
16 should or should not win this case.

17           As I instructed you previously, the jury  
18 is the sole judge of the extent of the testimony and the  
19 weight to be given the evidence.

20           These instructions are given to you as a  
21 whole, and you are not to single out one instruction  
22 alone as stating the law but must consider the  
23 instructions as a whole.

24           You have heard all of the evidence in the  
25 case, and you have heard the argument of counsel. The

1 Court has given you the charge in this case, and in a  
2 few moments, you'll retire to the jury room, select one  
3 of your members to act as foreperson, and begin  
4 performing the function for which you have been chosen  
5 and for which you have been empaneled in accordance with  
6 the oath you took as jurors.

7           You'll remember that at the beginning of  
8 the trial and throughout the trial, the Court admonished  
9 you not to discuss the case with each other until it was  
10 submitted to you.

11           Well, now is the time for you to begin  
12 your discussion, and you certainly may express an  
13 opinion from the evidence that you have heard and use  
14 any reasonable means to persuade any other members of  
15 the jury to your convictions and to your honest opinion.

16           You are to reach a verdict which speaks  
17 the truth and which does justice to all parties without  
18 favor, bias, or prejudice in any particular way, either  
19 for or against any party to this lawsuit.

20           In the course of your deliberations, do  
21 not hesitate to re-examine your own views and change  
22 your opinion, if convinced it is erroneous, but do not  
23 surrender your honest conviction as to the weight or  
24 effect of the evidence solely because of the opinions of  
25 your fellow jurors or for the mere purpose of returning

1 a verdict.

2           The verdict must represent the considered  
3 judgment of each juror. In order to return a verdict,  
4 it is necessary that each juror agree thereto. Your  
5 verdict must be unanimous.

6           As soon as you have reached a verdict,  
7 you will let this fact be known to the officer who will  
8 be waiting upon -- or he'll be waiting on you, and he'll  
9 report that to the Court.

10           Your verdict will be in the form of  
11 questions for you to answer. You'll take the questions  
12 to the jury room, and when you have reached a unanimous  
13 agreement as to your verdict, you'll have your  
14 foreperson fill in, date, and sign the form and then  
15 advise the court security officer that you have reached  
16 a verdict.

17           During your deliberations, you may have  
18 any of the exhibits that have been offered into  
19 evidence, and the Court will send them to you upon  
20 written request. If you desire further instructions,  
21 your foreperson may make this known in writing, and I'll  
22 try to comply with your wishes.

23           All communications with the Court must be  
24 in writing, but at no time should you indicate to the  
25 Court or to anyone else how the jury is divided in

1 answering any particular question.

2           Any notes that you've taken during this  
3 trial are only aids to your memory. If your memory  
4 should differ from your notes, then you should rely on  
5 your memory and not on the notes. The notes are not  
6 evidence.

7           A juror who has not taken notes should  
8 rely on his or her independent recollection of the  
9 evidence and should not be unduly influenced by the  
10 notes of other jurors. Notes are not entitled to any  
11 greater weight than the recollection or impression of  
12 each juror concerning the testimony.

13           I'm going to hand the questions to my  
14 briefing attorney. If you'll follow him to the jury  
15 room, select one of your members as foreperson, and  
16 begin your deliberations.

17           Now, one last instruction. You are now  
18 in charge of your schedule. You can break whenever  
19 you'd like to break. You can -- you know, I can work  
20 with you as late as 6:30, 7:00 o'clock tonight, if you  
21 desire to work that long, or if you -- if you decide to  
22 go home at 5:00 o'clock or 5:30 and come back in the  
23 morning, we can do that as well.

24           But I'm just -- I've set the schedule so  
25 far, but what I'm trying to impress upon you is you're

1 in charge of setting the schedule at this stage of the  
2 case. I just -- I do have something I need to take care  
3 of this evening, but I'll be willing to work with you  
4 until 6:30 or 7:00 o'clock, if you think that time is  
5 necessary to reach a verdict today.

6                   So with that, if you'll follow  
7 Mr. Warriner to the jury room. Y'all are excused to  
8 begin your deliberations.

9                   LAW CLERK: All rise for the jury.

10                   (Jury out.)

11                   THE COURT: All right. We're in recess  
12 pending communications from the jury.

13                   (Jury deliberations.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/\_\_\_\_\_  
SUSAN SIMMONS, CSR  
Official Court Reporter  
State of Texas No.: 267  
Expiration Date: 12/31/10

\_\_\_\_\_  
Date

/s/\_\_\_\_\_  
SHELLY HOLMES, CSR  
Deputy Official Court Reporter  
State of Texas No.: 7804  
Expiration Date 12/31/10

\_\_\_\_\_  
Date